United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 75-7495

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

COSMO RUGGIERO,

Plaintiff-Appellee,

—against—

KONINKLIJKE NEDERLANDSCHE STOOMBOOT MAATSCHAPPIJ, N.V.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff-Appellee
160 Broadway
New York, N. Y. 10038
BA 7-1350

MORRIS CIZNER
of Counsel

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Statement

This case was tried before Judge Thomas Kevin Duffy and a jury and a judgment was entered on a general verdict in favor of plaintiff in the sum of $31,063.00 against the defendant. Defendant's motion for judgment N.O.V. or a new trial was denied. The suit was based on a claim of unseaworthiness of defendant's vessel and the negligence of defendant.

Position of the Plaintiff

The jury verdict should not be disturbed as the Trial Court was not guilty of Judicial Misconduct nor Prejudicial Conduct which prevented defendant from having a fair trial; that the general verdict here should be affirmed whether or not notice necessary for a finding in negligence was proven as negligence here is unseaworthiness plus notice and Appellant does not raise the issue of insufficient evidence of unseaworthiness; that in any event there is sufficient proof from which the jury could and did deduce and find notice and negligence; that the charge to the jury was fair.

The Evidence

On April 17, 1970, plaintiff, a 41-year-old longshoreman, was working in a hatch on defendant's vessel when he slipped in grease or oil and fell injuring himself severely (74a). Cars were being loaded into the hatch and the method pursued was as follows: The car would be brought on board and landed on the top deck where it was kept from three to five minutes until the men below were ready to receive it (56a-57a). The car would then be lowered approximately 16 feet into the hatch onto a plywood flooring (67a). The longshoremen would then push the car aft and then bounce the car into place. The accident occurred while plaintiff and other longshoremen were trying to bounce a car (74a, 85a).

The loading commenced at 9:10 A.M. (56a) and the accident occurred at 9:45 A.M. (61a).

When he fell he first examined his arm which he injured and when he got up to *start* to walk he felt grease or oil on his shoe. He was asked:

> "Q. Mr. Ruggiero, so that after the accident you noticed something on your shoes. How soon after the accident did you notice whatever was on your shoe was there? A. When I got up and start walking around.
>
> Q. What, if anything, did you notice on your shoe? A. Grease or oil.
>
> * * * * *
>
> Q. What did you do with it? A. I got a piece of burlap and I cleaned it" (75a-76a).

The grease or oil spots that he actually slipped on was on the plywood and he saw it "when I fell on it, I mean I slipped on it" (84a). It was about 3 feet from the end of the square under the coaming. The grease or oil looked like that which he had seen on deck and it looked like something that comes from automobiles (77a). He didn't see any of this "stuff" on the deck in the lower hold because:

> "A. That is the lower hold. There is no deck. There was a floor in the square to land the car and push it aft and *there was grease and oil in the square when we pushed the car aft*" (86a).
>
> * * * * *
>
> "It was on the plywood, not the deck" (88a).

He told the Timekeeper that he slipped on grease and oil (89a).

Witness Gentile, the Deckman, had a language problem and described his efforts himself as "I don't talk too good"

(61a), but testified that while the cars were being brought on board, a ship's mate was standing nearby (58a) and the witness spoke to him of the reason for landing the cars on the deck (59a). When the cars were picked up off the deck and brought into the hatch some grease and oil was on the deck where the cars had been landed (60a). He saw plaintiff slip and fall down on the floor (61a). About 7 or 8 cars were loaded by the time the accident happened (66a). He was asked:

> "Q. You say you noticed some spots on the deck? A. Yes, sir.
>
> Q. When for the first time did you notice those spots? A. After about 2 or 3 cars" (66a).

He was also asked:

> "Q. When you saw that grease or oil or whatever it was, did you have another conversation with the mate? A. Yes, sir.
>
> Q. What did you say to him and what did he say to you? A. I tell him to put something, because I walk over here, to throw on the oil or grease or whatever it was. That is what he does. He calls somebody, the crew, he brings some sand or sawdust and throw on the oil or whatever it is" (60a).

The treating doctor had a number of heart attacks and is not practicing medicine at the present and is not able to go to court and an examining doctor testified to the injury and present condition. The treating doctor had reported an acute sprain of the left shoulder and left arm with induration and ecchymosis extending to the volar aspect left forearm, the induration being a hardness and

swelling due to bleeding into the tissues which swelling could be pitted by poking a finger in and the indentation will remain (93a-96a); that on examination in June, 1975 he found plaintiff still suffering with induration and spasticity of the trapezius muscle in the shoulder which was pulling the head downward and turning the neck to one side; there was marked elevation of the shoulder and thickening of the trapezius muscle; there was atrophy of the infrascapular muscles and the deltoid muscles (98a); severe and extensive restriction of motion of the arm; when flexing muscles against resistance there was fibrillations visible in the muscle itself due to muscle weakness; he was unable to maintain a tight grasp with the left hand for more than a short period (93a-104a). He concluded that plaintiff was suffering from a chronic derangement of the left shoulder which was in weakened and abnormal anatomical and physiological state as well as weakness of the muscles of the left arm and forearm. He found he had a 20% loss of use of the left arm (106a-107a).

Some of the findings were based on subjective complaints which depended upon the truthfulness of plaintiff. The doctor was asked:

> "Q. Did you accept as being true everything he told you and everything he complained about? A. No, I tested some of it for myself" (110a).

And he found nothing to warrant his disbelieving him. Also, in commenting about the history and causal relationship stated:

> "A. —I think that the fact that this man had induration all the way down to the wrist, as described by

> Dr. Tagliagambe, and injuries to the entire arm and shoulder, would indicate that there is a great deal more happening here than just feeling a pain in the arm. He would have to have fallen on it" (115a).

That with the type of injury he sustained a history that the injury came about by just lifting a car and feeling a strain is inconsistent with it (116a); that he expected the loss of grasping power and the limitation of motion and complaints of pain because of his physical findings that he made (117a).

I.

The parties had a fair trial and a just verdict followed. There was no prejudicial conduct on the part of Trial Court to warrant sending this case back for a new trial.

Appellant charges the Trial Court with Judicial Misconduct. This is a most serious charge and should not be made lightly. Appellant's brief does not set forth anything remotely justifying this claim. The fact that this issue is raised does not in itself establish merit to this appeal.

The trial judge must not give the jury the impression of partisanship or that he is hostile to one party's position. The Appellate Court must determine whether the judge's conduct improperly shifted the balance against the defendant and must bear in mind:

> ". . . the substance or triviality of the various matters claimed to have been the subject of prejudicial conduct or remarks on the judge's part. Experience teaches that quotations lifted out of the transcript can

> often be unintentionally misleading, since they usually fail to give a true or complete picture of the framework for and background of the allegedly prejudicial comments. Counsel, being advocates, also tend to attach excessive significance to some remarks and to overlook counterbalancing portions of the record. For these reasons it is essential at least where appellant's brief (as here) raises a substantial issue as to the trial judge's fairness in conducting the trial, to make a 'close scrutiny of each tile in the mosaic.'" *United States* v. *Weiss*, 491 F.2d 460, 468 (2 C.A. 1974).

The necessity for close scrutiny of the record is to find counterbalancing portions of the record and to give the significance of the alleged prejudicial comments that it deserves. But to begin with, substantial issues must be raised by Appellant. The object is not to ask the Appellate Court to read through the record and see if they can find something wrong as Appellant has requested here.

Appellant's complaints are trivial and insubstantial:

1. An episode occurred during the jury voir dire which was "galling" to defendant's counsel. The attorneys for both parties were asked if they knew the location of Wappinger Falls. It would appear that neither knew the location. Defendant's attorney claims he lowered his head to look at his papers and apparently the Court thought he was shaking his head yes. The record sets forth the following: "Do you know where that is, gentlemen? I have got one head shaking yes and the other one—tell us where it is so that they both know where it is" (5a). Counsel now claims he was embarrassed since he did not know a particular location. It never occurred to him that plain-

tiff's counsel was the "other one" referred to. If it was as Appellant thought it to be—wherein lies any prejudice? Surely counsel is not so all-knowing and yet so thin-skinned and vulnerable if a minutiae escapes him.

2. Claim is made that the judge, by "folksy questioning" of prospective jurors established such rapport with them that they came under his influence and "coupled with his repeatedly apparent animosity for defense counsel inevitably inured to the prejudicial detriment of defendant." Again the Appellant's brief merely sets forth words but no substance. To begin with, the snide reference therein that the "voir dire must be read to be believed" is uncalled for and incorrect. Appellant's Appendix pertaining to the picking of the jury is extremely foreshortened and taken out of context. Some additional questions asked by the judge on the voir dire are now found in the appendix printed by Appellee (41a-50a) and they speak for themselves. At no time did Appellant's counsel object to or take exception to the manner of picking the jury, nor did he request any further or different questions be asked. He found the jury satisfactory. He now finds something psychologically evil about it all with an "improperly induced subservient esteem" by the jury to the judge. The alleged basis of this claim is that the jurors came in with a verdict for plaintiff without fixing a dollar amount. When they were sent back for further deliberation (as this Court suggested be done in *Rice* v. *Atlantic Gulf & Pacific Co.*, 484 F.2d 1318 (2 C.A. 1973)), they returned with a fair and reasonable amount albeit it was an amount suggested by plaintiff's counsel on summation. The amount of the verdict did not come from the judge at all.

Such finding in plaintiff's favor is proof positive to Appellant that the judge had a Svengali control over the jury and that his antipathy towards the defendant's attorney was transmitted to the jury resulting in prejudice against the defendant and this is manifested in the verdict. Thus we have here reasoning confused by advocacy and blind partisanship, namely, that if this defendant loses, its because of a whole chain of imagined wrongs, undue influence, antipathy and prejudice. It never occurred to Appellant that it misjudged the case and the jury believed the plaintiff.

The animosity referred to by Appellant started, according to its brief, when counsel said he had not heard the witness respond to the oath and the judge "snapped" at him with a suggestion he come close. The "snap" is not in the record and is an advocate's interpretation just as defendant's objection was "curtly overruled" (page 5 of Appellant's brief).

Appellant found "judicial enmity" when the Court overruled defendant's objection to plaintiff reading a "self-serving deposition testimony not in evidence." How that constitutes enmity is difficult to understand.

As to the possible error in the reading from the deposition during summation, this was not so substantial as to warrant an order for a new trial. The deposition was not in evidence. Objection to reading from a document not in evidence is really an objection to referring to material facts not in evidence. If not substantial in nature or obviously if the facts were testified to there can be no prejudice warranting a new trial. In *Edwards* v. *Sears, Roebuck & Co.*, 512 F.2d 276 (5 C.A. 1975), the Court stated

that a "particularly indefensible tactic was the use of the closing arguments to bring before the jury damaging facts not in evidence and never established." In our case plaintiff testified to the oil or grease on the shoes which had been removed by wiping with burlap. The very small portion of the deposition that was read was to the same effect.

The defendant, in his summation, read from this deposition *not* in evidence to the effect that plaintiff slipped and fell but did not look at the very spot after he fell. Counsel then commented that plaintiff testified in court that he looked at his shoes afterwards and saw grease or oil which he wiped off with a piece of burlap (121a). This juxtaposition of the deposition versus trial gave the impression that plaintiff did not mention grease or oil on his shoes at the deposition but first raised it at trial. This was in line with defendant's accusation in the summation of "recent fabrication" in the attorney's office (122a). This reference to the deposition not in evidence and the use of it to get the jury to draw the wrong conclusion raises a question of proper conduct on counsel's part. To prevent the jury from being misled and to redress this wrong, plaintiff's counsel, on summation, pointed out that plaintiff testified on this deposition with respect to grease and oil he found on his shoes when he started to walk and his cleaning of it using burlap. There is nothing new about this fact and is exactly the testimony the plaintiff gave at the trial (76a).

What appears to be of greater significance arising out of the reading of the deposition is defendant's attorney's hypersensitivity and overreaction to the most innocuous

remarks. In effect, he takes the position if you don't agree with him, you hate him.

During the plaintiff's summation, when reference was made to the deposition reading, the only exchange between the Trial Court and the defendant's attorneys was the following:

> "Mr. Kimball: If Your Honor please, there is no evidence of this.
>
> The Court: There was no evidence when you read it either that I remember.
>
> Mr. Kimball: I respectfully disagree with you. In any event your memory, I suppose, will govern" (125a).

After summation, defendant took exception to the Court "admonishing" counsel for taking exception (which he did not do) to plaintiff's reading from the deposition, the Court saying to him "so fast" and "in such a rude and cutting and peremptory manner as to be indicative of judicial animosity which I dislike" (18a).

How defendant could conceivably have gotten all that description from this exchange (125a) above quoted, is beyond comprehension.

When the Trial Judge said he was astounded, the attorney replied he hadn't made his point and so won't try. The Trial Judge then commented that defendant's attorney has shown greater hostility and animosity towards him personally and to the Court and "I have given you a fair trial. I will give you a fair charge" (127a), but warned counsel not to do it again. Counsel's retort was "I hear you but I don't understand you." Obviously, defendant's

attorney was not cowed but rather aggressive toward the Court; his exaggerated reaction and imagined description or characterization does not justify his unfounded accusation against the Judge.

Parenthetically, all of the above took place not within the hearing of the jury.

The key question is not the hostility between the Court and counsel, but whether the jury was prejudiced against the defendant. There are no signs of it here.

In Appellant's footnote to this claim of enmity is found half-truths, misquotes, irrelevancies and citations that are inapplicable (see footnote 2, page 5, Appellant's brief).

Appellant's reference to judicial misconduct without basis in fact and the suggested violation of the Judicial Canons of Ethics is particularly objectionable since defendant's counsel disregarded all propriety and himself went beyond permissible limits of fair comment during the trial. His summation charged plaintiff's attorney's office with fabricating a witness' testimony (page 7a, Defendant's Appendix) and plaintiff's attorney "having the client who has the burden of proof, he not only should have the last word, but in some of these cases he badly needs it. This is one of those cases"; and that he will make an "effort to bamboozle or distract the jury but really play on" a jury's sympathies (123a).

In *Koufakis* v. *Carvel,* 425 F.2d 892 (2 C.A. 1970), at page 904, this Court under similar circumstances indicated that such behavior was in transgression of the Canons of Professional Ethics. Parenthetically, it should be noted that the jury during its deliberation requested a reading

of this claimed fabricated testimony of the witness Gentile and after hearing it found counsel's accusation to be false and returned with a verdict for the plaintiff.

II.

1. The evidence being sufficient to sustain the unseaworthiness claim, the general verdict should not be disturbed.

Appellant, in its brief (page 6), states that with respect to the claim of unseaworthiness it does not raise the issue here as to whether there was insufficient evidence. It does, however, raise the issue of insufficient evidence of negligence claiming that there was no notice either actual or constructive; that since the verdict was a general verdict, if there was failure of proof in negligence the general verdict must be reversed.

Appellant is wrong in its understanding of the law.

The Court charged the jury that:

> "in order for the plaintiff to establish negligence, he must prove by a fair preponderance of the credible evidence, first, that there existed a hazardous condition with respect to here the greasy or oily substance on the plywood in the lower hold of #2 hatch" (24a).

With respect to the claim of unseaworthiness the Court charged:

> "Seaworthiness is the reasonable fitness for an intended purpose of a ship and its equipment.

Directed to the present case it is a question as to the reasonable fitness of that portion of the ship in which plaintiff claims to have been injured" (26a-27a).

There was only *one* ground submitted to the jury as a basis for finding negligence or unseaworthiness, namely, the condition by reason of the greasy or oily substance on the plywood floor. The difference between negligence and unseaworthiness is that in unseaworthiness proof of notice is not required and the exercise of reasonable care plays no part. Thus, here, negligence encompasses unseaworthiness. By its general verdict if the jury found negligence that would include a finding of unseaworthiness. If it could not find negligence because of lack of notice, the verdict must be in unseaworthiness. Therefore, the general verdict in this case should not be reversed since Appellant does not even raise the issue whether there was insufficient evidence of unseaworthiness to prove it.

Cases are cited by Appellant in support of its position but its counsel is obviously misleading the cited cases. For example, *Fatovic* v. *Holland America Line,* 275 F.2d 188 (2 C.A.) deals with a case in which a negligence claim was dismissed and five different conditions given the jury on the question of unseaworthiness. The Court found two of these conditions were not supported by any evidence. The general verdict was reversed because one could not tell whether the jury relied on proper or improper claims of unseaworthiness.

Also the case of *Mosley* v. *Cia. Mar. Adra, S.A.,* 314 F.2d 223 (2 C.A.), cert. den., 375 U.S. 829, is cited and there, there was a directed verdict in defendant's favor in the negligence cause of action and the two grounds support-

ing unseaworthiness submitted to the jury, one adequate and the other inadequate as a matter of law. A general verdict had to be reversed since there was no way of knowing that the invalid claim of unseaworthiness was not the sole basis of the verdict.

2. There was sufficient evidence of notice to shipowner and hence negligence.

Furthermore, there was more than adequate testimony for the jury to find notice by defendant of grease or oil on the working surface. Our case is not like the facts in *Wiseman* v. *Sinclair Refining Co.*, 290 F.2d 818, cert. den., 368 U.S. 837, where the only evidence with respect to grease was plaintiff's testimony that he saw grease on his shoes after falling and there was no testimony where the grease on the shoes came from.

Our case is also unlike the facts in *Rice* v. *Atlantic Gulf & Pacific Co.*, 484 F.2d 1318 (2 C.A. 1973), where there was no testimony that an agent saw an accumulation of oil on the ladder and no circumstantial evidence from which such observation might be inferred (actual notice), nor was there evidence regarding size, visibility or length of time it had been there (constructive notice).

In our case plaintiff slipped on oil or grease that was on the flooring of plywood about 16 feet below the main deck. The cars being loaded were first landed on the top deck and then lowered onto the plywood on which the longshoremen pushed the cars and bounced them into place. As each car was removed from the top deck there were drops of grease and oil on the deck, accumulating, where the cars had been landed. There was grease and oil on

the plywood and the cars were pushed across through it and then bounced into place. They started handling cars at 9:10 and the accident happened at 9:45. During this time a ship's mate was on deck and spoke to the deckman about the landing of the cars on deck and the mate was asked for sand or sawdust to spread over the oil on deck. The deckman had seen plaintiff slip and fall and when he looked down at the walking surface when the slipping took place he could and did see the spots of grease or oil.

The jury could have reasonably inferred and concluded that the ship's mate saw the oil and grease accumulating on deck from the dripping cars; that he knew that the same condition existed wherever the cars landed including the plywood below; that the condition existed for half an hour and was visible to him not only that which was on the deck but on the plywood as well; that just as the deckman could see the spots of grease and oil on the plywood below when the slipping and falling occurred, the mate could have seen the condition complained of had he looked before the occurrence; that a substantial amount accumulated by the time the accident occurred—enough to require spreading of sand or sawdust for safety purposes; that when plaintiff fell, he first examined his arm and then got up and when he started to walk (not at a later time), felt the grease and oil on his shoes and there was so much of it there to require the use of burlap to wipe his shoes.

Thus, there is more than sufficient testimony to justify a finding of both actual and constructive notice.

III.

The charge to the jury was proper.

Defendant submitted 52 Requests to Charge. The Trial Court informed defendant prior to summation that most of the requests were going to be granted or covered and asked counsel if he wished special rulings on each one. Counsel stated he did not require any on each one prior to summation (120a). His complaint is now with respect to six of these requests.

Defendant's brief quotes *Oliveras* v. *United States Lines Company,* 318 F.2d 890, from page 892, but his quote gives only a portion of the paragraph omitting the law set forth therein which does not support his contention at all. The rest of the paragraph from that quoted decision reads as follows:

> "But the court is not required to give instructions in the language and form requested. If the charge as given is correct and sufficiently covers the case so that a jury can intelligently determine the questions presented to it, the judgment will not be disturbed because further amplification is refused. * * * Our appellate function is to satisfy ourselves that the instructions, taken as a whole and viewed in the light of the evidence, 'show no tendency to confuse or mislead the jury with respect to the principle of law applicable.'"

The Requests to Charge in question are amplifications of the Judge's charge. The requests 6 and 11 are covered

at 30a-32a; 19 and 22 are at 24a; 30 is covered at 24a and 27a; 52 is at 28a-29a.

The defendant had a fair charge.

Some comment should be made about the medical testimony since Appellant refers to same.

Appellant, in its brief, sets forth two histories which do not refer to slipping and falling and argues therefrom that the opinion of plaintiff's medical witness is unreliable unless based on proven facts; that since the history he received differed from that reported by the treating doctor, the witness' opinion is unreliable and hence the Request to Charge #11.

The doctor's opinion should be based on facts in evidence. Not only does the history he received jibe with the testimony but by its verdict the jury perforce concluded that he slipped and fell and sustained the injuries claimed.

Plaintiff suffered a severe injury and has painful and severe residuals. The nature and extent of the injuries as reported by the treating doctor are inconsistent with the history of moving a car and feeling a strain; they are consistent, however, with his slipping and falling on his arm.

With respect to the matter of symptoms and conditions, they are in the main, objective or to be expected. The physical findings were and are such that the medical witness expected to find complaints of pain, loss of grasping power and weakness and limitation of motion of the arm. He found a 20% loss of use of an arm which conclusion was supported by physical findings.

It is submitted that the questions raised by Appellant with respect to medical testimony are irrelevant to this appeal in view of the testimony and the jury's verdict.

IV.

CONCLUSION

The verdict in plaintiff's favor should be affirmed in all respects.

Respectfully submitted,

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff-Appellee

MORRIS CIZNER
of Counsel